

CHAPTER 21

PRIVILEGES AND IMMUNITIES

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INTRODUCTION

Foreign Service employees and family members serving abroad need to understand the scope and limitations of the privileges and immunities that flow from their diplomatic or consular status, and the obligations and liabilities that their status imposes upon them.

Privileges and immunities are set forth rather explicitly in two basic bilateral treaties, the Vienna Convention on Diplomatic Relations of 1961 (VCDR) and the Vienna Convention on Consular Relations of 1969 (VCCR). Additional privileges and immunities may be contained in bilateral agreements, most of which are styled as consular agreements, but other agreements, such as friendship commerce and navigation treaties may also contain provisions that pertain to the immunities of consular and diplomatic personnel and to the embassy and consular offices. Frequently, international organizations have treaties or arrangements with host states that provide for privileges and immunities for their own staff, members of missions to that organization, or experts or other representatives on a mission for that organization (e.g. peacekeeping, humanitarian assistance). Finally, some agencies, such as USAID or Peace Corps, have specific arrangements with a host state that provide privileges and immunities “consistent” with a particular status.

The discussion below can provide only a general framework. When seeking information about a specific factual situation, guidance should come from someone who demonstrates a full understanding of the modern treaties that address the subject. The Legal Adviser's Office of Diplomatic Law and Litigation has legal experts who will advise you on these matters. In addition, you should be able to review the applicable treaties in the post library, the administrative office, and on the Internet.

The discussion below addresses the situation of U.S. Government employees of the foreign affairs agencies and employees of other U.S. agencies who are posted abroad and notified to a receiving state as diplomatic agents or members of the administrative and technical staff for embassy personnel, or as consular officers or members of the consular staff for those assigned to consulates outside the capital. It also applies to some family members who the relevant treaty and/or host state treat as part of their household. Family members who are nationals of the receiving state generally will not have any privileges and immunities.

This discussion of privileges and immunities does not, however, address the situation of U.S. personnel assigned to U.S. missions to international organizations abroad. Note also that USAID employees generally receive their privileges and immunities pursuant to the bilateral economic assistance agreement between the United States and the particular country to which the employee is assigned. USAID employees can determine their status at a particular post by talking with the Regional Legal Advisor or the Executive Officer.

BACKGROUND

Centuries ago, sovereign states discovered that it was not possible to maintain useful diplomatic relations with other nations if their respective diplomatic envoys had to live in fear of being thrown into a dungeon for carrying unfavorable opinions to the host government or for other real or imagined offenses to the host state. When these early diplomats began to reside in the host state, it was realized that they needed security in their persons, homes, and official papers in order to accomplish the work that both the sending and receiving states agreed (during moments when tempers were cool) that they should accomplish. Over time, a body of customary international law developed to provide a broad range of privileges and immunities for diplomats, eventually including some degree of similar protection for members of their staffs and families. The Vienna Convention on Diplomatic Relations, concluded in 1961, reflects the customary international law (refined and brought up-to-date) with respect to diplomats and is now adhered to almost universally by the nations of the world.

Consular representatives were traditionally considered quite apart from diplomats. Historically, consular functions consisted of assisting in the resolution of problems involving the consul's own countrymen present in the host state for business or pleasure, and of issuing travel documents. These were held to be matters not warranting special privileges and immunities. Over time, however, consular functions became more sophisticated. States came to realize that at least a limited degree of protection was necessary for their consuls. Many nations, including the United States, entered into

bilateral agreements with their principal allies and trading partners to provide for certain consular privileges and immunities.

The Vienna Convention on Consular Relations of 1969 incorporates rules that were developed by customary practice and found in bilateral consular agreements and has obtained broad adherence. However, these consular privileges and immunities are generally markedly less than those afforded diplomats. Nonetheless, some nations have, on a bilateral basis, concluded agreements with the United States that provide additional privileges and immunities for consular personnel. It is thus critical that, when attempting to ascertain privileges for consular personnel, it is determined whether there is an applicable bilateral agreement.

The same U.S. Government employee may be accorded diplomatic immunities during one tour at an embassy and quite different (and lesser) immunities during a subsequent assignment to a consulate separate from the embassy. This is because entitlement to privileges and immunities stems from the status accorded a particular individual when he or she is formally accepted in a particular capacity by the receiving state and the post to which the person is assigned in that country. Status is not determined, in this context, by any professional designation, rank, or title that the sending state may assign.

Possession of a diplomatic passport alone affords its holder no privileges or immunities of any kind. The advantages that the diplomatic passport does afford are only courtesies that are without significance under international law and should not be relied upon.

Similarly, a person accredited to a particular country is entitled to the privileges and immunities that correspond to his or her specific status only in that particular country (and, to a limited extent, when in transit to or from that country); not in third countries when on personal leave or even on official TDY. The receiving state accepts the posting of an individual and has the power to end privileges and immunities at any time by declaring that individual *persona non grata*, giving the individual a reasonable time to depart before privileges and immunities cease. No reason need be given.

DIPLOMATIC IMMUNITY (EMBASSY ASSIGNMENTS)

While all official U.S. employees sent from Washington to embassies abroad share certain protection (e.g., criminal immunity, personal inviolability [immunity from arrest or detention], inviolability of property, including car, residence, official papers and correspondence), there is a functional distinction between diplomatic agents (engaged primarily in diplomatic exchange between the two states) and members of the administrative and technical staff (engaged primarily in the support of the former category). Both categories are entitled to total immunity from the criminal jurisdiction of the receiving state. However, diplomatic agents enjoy more extensive immunity from the civil and administrative jurisdiction of the receiving state than do members of the administrative and technical staff. Administrative and technical staff (and family members of diplomatic agents and administrative and technical staff) have immunity only

if they are not nationals of the receiving state. And service staff who also have immunity only if they are not nationals of the receiving state do not have criminal or general civil and administrative immunity; their immunity extends to acts performed in the course of their official duties. Those on TDY who have not been notified to the host state have no privileges or immunities; nor do American citizens locally hired (Rockefeller appointments or Personal Service Contractors). Eligible Family Members ordinarily retain their status as members of the household of the sponsoring employee.

It is the duty of all personnel with privileges and immunities to respect the laws and regulations of the receiving state. United States Government employees are all expected to pay their just debts and other obligations and may not use their privileges and immunities to avoid them.

Criminal Immunity

Complete immunity from criminal jurisdiction means that a person may not be detained or arrested or subject to a body search and may not be prosecuted or required to give evidence as a witness. This immunity may be waived, and it may be waived in a limited fashion, but it is the U.S. Government's immunity and must be waived by the Government; it cannot be waived by the individual or the post. To avoid a common complication, individuals who drive vehicles in the host state are advised to carry local liability insurance and may wish, in light of several cases where U.S. Government employees are being sued in the United States, to carry the same liability insurance limits overseas as they do at home.

Immunity from criminal jurisdiction does not mean that the receiving state authorities are precluded from interrupting certain dangerous criminal actions that present an immediate threat to public safety (e.g., stopping a diplomat who is driving dangerously). However, Foreign Service employees serving abroad need not perform duties under the threat of being treated as a common criminal by the law enforcement and judicial authorities of the receiving state.

Civil and Administrative Immunity

Civil and administrative actions are those in which a person or business (or a government) files a complaint (often seeking monetary damages) against another person before the civil or administrative authorities of the receiving state. Diplomatic agents enjoy comprehensive immunity in this respect, with three exceptions: actions connected with real property in the receiving state; actions where the diplomat is an executor or beneficiary of an estate in the receiving state; and actions relating to professional or commercial endeavors engaged in by the diplomat outside the scope of official functions. In general, members of the administrative and technical staff of embassies are only afforded civil and administrative immunity with respect to actions related to the performance of their official functions. (Special bilateral agreements with some countries grant more extensive immunities, which are sometimes identical to those of diplomatic

agents, to members of the administrative and technical staff. Check with your post management officer for the status of a specific country.)

For example, a member of the administrative and technical staff would probably be personally immune from a suit for breach of contract in connection with a contract that the employee negotiated with a local vendor for services to be provided to the embassy (although the U.S. Government might be a defendant). On the other hand, a member of the administrative and technical staff would ordinarily have no immunity from a private lawsuit for failure to pay personal debts or for compensation for damage to the property of a local citizen alleged to have occurred while the individual was off duty.

DIPLOMATIC IMMUNITY AND FAMILY MEMBERS

The preceding paragraphs refer to the immunities of the employee. The fundamental notion of privileges and immunities is to protect the interests of the sending state in having its employees be able to perform their official functions. The sovereign states discovered some time ago, however, that the employee could not be effectively protected without extending certain protections to the members of the employee's immediate family who reside with him or her. Today, family members forming part of the household of most diplomatic personnel are also accorded extensive immunities. However, cohabiting partners of Foreign Service personnel or any family members not accepted by the host state as members of the household are not accorded any of the privileges described below. Further, adult children are not typically afforded immunities unless special circumstances (e.g., substantial disabilities) warrant.

U.S. citizen spouses and other household family members have the same immunities as the sponsoring accredited diplomat. However, under the VCDR, family members who are nationals of the host country (when the sponsor/employee is a diplomatic agent) or nationals or permanent residents (when the sponsor/employee is a member of the administrative and technical staff) do not have privileges and immunities in that state. For example, a spouse of French nationality would not have privileges and immunities in France but, when posted to any other country, would receive precisely the same privileges and immunities, as would a spouse of U.S. nationality.

The criminal immunities of family members of diplomatic personnel are the same as those to which the sponsoring employee is entitled—that is, total criminal immunity for the families of both diplomatic agents and members of the administrative and technical staff.

The civil and administrative immunities of families also correspond to those accorded both categories of sponsors. However, members of the administrative and technical staff (the sponsors/employees) themselves enjoy only “official functions immunity” against civil and administrative actions. Thus, family members of administrative and technical staff employees enjoy no civil or administrative immunity (except in specific countries where a bilateral agreement might provide otherwise).

WAIVER OF DIPLOMATIC IMMUNITY

The right to waive immunities for any of its diplomats, staff employees, or family members resides in the government of the sending state and in our case only with the Department of State. The individual who ultimately benefits from the immunity has no power to waive such immunity, even in cases where he or she believes that it would be in his or her personal or commercial interest to do so. Rather, the sending state may waive immunity when it judges that to do so is in the national interest. An individual whose immunity is waived has no standing under international law to protest this determination.

The Department of State requests waivers of immunity from criminal jurisdiction in almost all cases involving foreign personnel accredited to the United States to ensure that the proper course of justice proceeds. On this basis, the U.S. Government may seriously consider waiving the criminal immunity of its employees, especially in cases where it is believes the employee would receive a fair trial and the interests of the United States would not be harmed.

The only instance in which the action of an individual can directly cause the partial loss of immunity is when an employee entitled to civil and administrative immunity initiates a civil suit in the local courts. In that case, the VCDR bars the individual from asserting immunity from counter-claims with respect to the same subject matter.

Even in a case in which all would believe it to be in the interest of the U.S. Government for a certain immunity to be waived (e.g., an embassy employee is the sole, disinterested witness to a crime and, as a “good citizen,” wishes to testify as a witness at the trial), authorization for a limited waiver of immunity must be sought from the Department of State by the embassy. If granted, it must be expressly communicated to the foreign ministry of the receiving state before the employee takes any action. (A limited waiver might, for example, be devised to permit a diplomat to testify regarding an automobile accident that he or she witnessed, but leave completely protected the diplomat’s immunity from the jurisdiction of the receiving state in all other respects.)

Dependent Employment

The VCDR contemplates the possibility that a receiving state may permit local employment by diplomatic family members and provides rules regarding consequential restrictions on the immunities of family members when they are permitted to undertake local employment.

The Family Liaison Office in the Department of State negotiates bilateral employment agreements with other states to increase the opportunities for family members of official U.S. Government employees to obtain employment in the state to which their sponsor has been assigned. As of 2002, 85 bilateral agreements had been concluded, and negotiations with additional countries are ongoing.

These dependent employment agreements acknowledge the limitations on civil and administrative (but not criminal) immunity for family members who take up employment in the receiving state, but only to the extent that such civil or administrative actions are related to the employment.

This means that an employed family member continues to enjoy the privileges and immunities to which he or she would otherwise be entitled unless a suit is brought to recover monetary damages (or other civil remedy) for an act by the employed family member that is determined by a local court to be connected to his or her employment. For instance, immunity would probably not exist in the case of a suit against a family member by the employer based on allegations of fiscal improprieties.

LIMITS ON IMMUNITY

Persons enjoying diplomatic privileges and immunities are, at least in a literal sense, “above the law” of the receiving state. All states that enter into diplomatic relations with other states accept this encroachment on their sovereignty as a necessary cost of being a member of the world community. However, the immunity concept would never have endured if its application left the receiving state helpless to react to the commission of serious crimes in its territory or without recourse when foreign diplomats abuse the civil law rights of its citizens. In order to understand that some control must be retained, one need only recall the sense of outrage expressed by U.S. citizens whenever diplomatic immunity thwarts prosecution of a serious crime by a diplomat assigned to the United States. For this reason, the principle developed that all persons enjoying privileges and immunities also have the obligation and duty to respect the laws and regulations of the receiving state. This principle is expressly stated in both the VCDR and the VCCR.

In addition, the receiving state has the right to declare any person entitled to diplomatic privileges and immunities to be *persona non grata* (PNG) at any time and without stating a reason. When declared PNG, a person has a certain period of time to depart the country before being divested of all privileges and immunities. Failing such departure, the person faces any pending legal actions (civil or criminal) with only the defenses available to an ordinary citizen. In extreme cases, the receiving state will designate a very short time within which departure must take place or even formally expel the person.

The PNG procedure is sometimes employed for purely political purposes. It is also used by the host state to require the departure of diplomatic personnel who have committed serious crimes or who have shown themselves to be generally disrespectful of local law. Family members may not be declared PNG since their privileges and immunities are derivative, stemming from their status as family members. However, if the departure of a family member is desired, it is common practice to declare the sponsor PNG, thereby divesting the entire family of protected status. The PNG procedure is harsh and abrupt, but receiving states do not hesitate to use it in addressing unacceptable behavior.

Furthermore, immunity from the criminal jurisdiction of the receiving state is not a pardon of criminal behavior; it simply creates a bar to the exercise of jurisdiction over the individual for the behavior by the receiving state for the period during which the individual has diplomatic status. Diplomatic immunity continues after the termination of diplomatic status only in respect to actions relating to the official acts of the employee. A person with diplomatic privileges and immunities who commits a crime may, after the completion of that tour, have to be concerned with extradition attempts by the country where the crime was committed, or with the existence of an outstanding warrant for arrest that effectively bars return to the country in question.

The assertion of diplomatic immunity by U.S. diplomats, consular officials, and family members abroad, even in routine cases, does not occur without visibility in the embassy and the Department of State. To illustrate, a teenage diplomatic dependent is apprehended in an act of vandalism, identifies him or herself as a person entitled to diplomatic immunity, and is thus released. Within a short time, the local authorities will bring the incident to the attention of the host country foreign ministry that will in turn send a note to (or, in extreme cases, call in) the U.S. Ambassador to remind him or her in pointed terms of the obligation of all diplomatic personnel to respect the law of the host state and to ask that all necessary steps be taken to prevent such occurrences in the future. Sometimes the host country will ask for a waiver of immunity. The Ambassador may feel obliged to apologize personally to the victims of such activity. Involvement of the embassy's front office will almost certainly prove embarrassing to the employee and the family involved. It is worth noting that when minor children are PNG'd, the diplomat or consular officer is also generally PNG'd because the child's status is derivative of the principal's.

The Department of State has, as a matter of policy, directed that personnel at posts abroad pay their traffic fines promptly, regardless of whatever privileges and immunities they enjoy. The Department of State instructs its personnel abroad to drive safely and comply with local traffic laws, and considers attempts to "hide behind immunity" inappropriate.

Department of State regulations prohibit diplomatic or consular personnel from taking advantage of their privileges and immunities for improper objectives or to evade the settlement of just obligations. Violations of this prohibition would almost certainly have a negative effect on the individual's career.

CONSULAR IMMUNITY

Consular immunity today proceeds from the same conceptual basis as diplomatic immunity. Therefore, some of what is said above about status, duty to respect local law, and PNG also pertains to consular immunity. With a few states, the United States has special bilateral consular conventions that grant consular immunities that are substantially enhanced privileges and immunities. The terms of these special consular agreements differ; some provide more extensive immunity only to the employee, not to family members. Consular personnel should always confirm their status at a specific post.

In general, consular privileges and immunities are dramatically more limited in scope than those afforded diplomats, particularly with respect to immunity from the jurisdiction of the receiving state. Consular officers and other employees at consulates have criminal, civil, and administrative immunity only with respect to acts performed in the exercise of consular functions. With limited exception for serious crimes, consular officers cannot be arrested or detained pending trial. Members of the consular staff, however, have no such protection.

Note, however, that persons assigned to consular sections of U.S. embassies are members of the mission, not consular officers and employees, and accordingly are granted diplomatic status. The family members of consular employees have essentially no immunity from the jurisdiction of the host state as they do not perform official acts.

The determination of whether something qualifies as an “official act” or “consular function” is generally determined by the courts of the receiving state. This means that in the face of criminal charges or a civil action concerning official acts, the Post should immediately contact L/DL (Vanderlyke or Light) so that representation by the U.S. Department of Justice can be arranged.

In laws, the best approach when you are serving at a post abroad is to study the local customs and commercial practices carefully and pursue the same “good citizen” style of life followed at home. If you nonetheless run afoul of the law of the host country, your privileges and immunities will protect you to the extent outlined above.

RESOURCES

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